90-1151

No. 90-1151

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

Dr. Mahmoud Ziaee and
Dr. John L. Sherlock,
Cross-Petitioners & Respondents,

vs.

Dr. T. Bruce Vest,
Vest Medical Consultants, Ltd.
Vest Medical Consultants, Ltd. Plan No. 001, and
Vest Medical Consultants, Ltd. Plan No. 002,
Cross-Respondents and Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals departed from the accepted and usual course of judicial proceedings by substituting its judgement of the facts for the District Court's findings in reversing the District Court's award of pension benefits to Cross-Petitioners under Plan No. 002.

2. Whether the Court of Appeals erred in setting aside a portion of the District Court's award with respect to attorneys fees and the award of prejudgement interest with respect to an amount of pension benefits which was tendered to Cross-Petitioners only subject to conditions not permitted under the Plan and 29 U.S.C. § 1140.

3. Whether the Court of Appeals erred in requiring the District Court to reconsider the penalty awarded to Cross-Petitioners for the Cross-Respondent's failure to provide plan documents to Cross-Petitioners as required by 29 U.S.C. §1024.

4. Whether the Court should resolve conflicting decisions of the Sixth, Seventh and Eleventh Circuit Courts of Appeal regarding how a District Court is to exercise its discretion in conducting a *de novo* review of the Plan Administrator's interpretation of an ERISA plan.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cross-Petitioners, as above captioned, pray that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Seventh Circuit entered on October 19, 1990, as amended on October 30, 1990.

OPINIONS BELOW

The opinions and orders of the lower courts, filed as Appendices with the Cross-Respondents' Petition dated January 16, 1991, are incorporated herein by reference.

JURISDICTION

The opinion of the Court of Appeals was entered on October 19, 1990. The opinion was modified by an Amending Order dated October 30, 1990. Cross-Respondent's Motion for Rehearing was denied on November 21, 1990. This Petition represents both a Cross-Petition in response to Cross-Respondents' Petition and a Petition to be considered independent of the Cross-Respondents' Petition. Jurisdiction to review the judgement of the Court of Appeals is conferred on this Court by 28 U.S.C.A. § 1254(1) (West Supp. 1990).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those set forth in the Petition of the Cross-Respondents, as well as those presented below.

29 U.S.C.A. § 1024(b)(4) (West 1985) provides:

> **(b) Publication of summary plan description and annual report to participants and beneficiaries of plan**
>
> (4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by

regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

29 U.S.C.A. § 1108(c)(2) (West 1985) provides:

> **(c) Fiduciary benefits and compensation not prohibited by section 1106**
>
> Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from-
>
> (2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred;

29 U.S.C.A. § 1140 (West 1985) provides:

> **Interference with protected rights**
>
> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the

Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

Cross-Petitioners, Dr. Mahmoud Ziaee and Dr. John L. Sherlock are radiologists working in Madison County, Illinois. They were both employees of Cross-Respondent Vest Medical Consultants, Ltd. ("VMC"), an Illinois corporation in the business of providing medical services. At all pertinent times, Cross-Respondent Dr. Vest was the owner of all the outstanding shares of VMC.

In 1976, VMC established (and at all relevant times continued to maintain, as plan sponsor) two pension plans, Plan No. 001, a "defined contribution plan", and Plan No. 002, a "defined benefit plan". Dr. Vest is and has been at all times the Plan Administrator of both Plans and the sole Trustee of both Plans.

On July 1, 1976, Cross-Petitioner Ziaee was hired by VMC and in April, 1979 VMC hired Cross-Petitioner Sherlock. Both became Participants in Plans No. 001 and No. 002, and accrued pension benefits under those Plans until June 28, 1985, when their employment by VMC ceased.

Under Plan No. 001, VMC made contributions to each participant's account equal to 10% of each participant's annual compensation. Plan No. 001 provided that benefits would be distributed based on the fair market value of each Participant Account's share of the Plan's earnings and losses. On December 30, 1977, VMC adopted a corporate resolution providing for a payment of "investment income of 7% on the net balance of the employees contribution for Plan I".

Beginning in January, 1985, the Cross-Petitioners (and later their agents or counsel) began requesting copies of Plan documents from Cross-Respondent Vest. Their requests were not honored prior to June 28, 1985, on which date the employment relationships between VMC and the Cross-Petitioners were terminated.

On July 13, 1985, Cross-Petitioners were offered Cashier's Checks purporting to represent their benefits under Plans No. 001 and 002 (less an administrative fee not permitted by the Plans or 29 U.S.C. § 1108(c)(2)). In September, 1985, Dr. Vest offered additional benefit payments to Drs. Ziaee and Sherlock conditioned upon the Cross-Petitioners' prior execution of a "Release and Discharge". The "Release and Discharge", by its terms, would have released all Cross-Respondents from any claims (both ERISA and non-ERISA) by the Cross-Petitioners. Cross-Petitioners refused to sign the Release, for fear this would compromise their rights with respect to other claims against Dr. Vest and other Cross-Respondents, and the offer of the additional benefit payments was then rescinded.

After several fruitless attempts to obtain Plan information from Dr. Vest in order to resolve their differences, Cross-Petitioners filed the instant action on April 4, 1986. Their initial petition simply requested an order directing Dr. Vest to produce the requested Plan documents along with the imposition of civil penalties and payment of attorneys fees.

The action was later amended to request the District Court to determine and award pension benefits to which the Cross-Petitioners are entitled under the two pension

plans. During the discovery process, the requested Plan documents were eventually obtained from the Cross-Respondents. Prior to trial, the parties placed sums in the Court Registry representing both the amounts offered to Cross-Petitioners in July, 1985 and additional amounts representing benefits payable from the two Plans.

During a bench trial in March of 1989, the District Court heard testimony from Dr. Vest, Dr. Ziaee, Dr. Sherlock and various other witnesses. On July 14, 1989, the District Court entered judgement in favor of the Cross-Petitioners, awarding pension benefits to Cross-Petitioners for both Plan Nos. 001 and 002 that differed from the amounts offered by Dr. Vest. *See Cross-Respondents' Petition, at p. A-15 of App. B.* The District Court also awarded prejudgment interest on the pension benefits *Id. at p. A-12 & 13 of App. A*, ordered Dr. Vest to pay civil penalties for his failure to provide plan documents on a timely basis and awarded attorneys' fees to Cross-Petitioners *Id. at p. A-26 of App. D.*

The Cross-Respondents motions for alteration or amendment of the judgement or a new trial were denied by the District Court in its order of October 31, 1989. *Id. at pp. A-17 to A-24, App. C.*

On appeal, the Court of Appeals reviewed the District Court's award of benefits under Plan No. 002, concluding that the District Court's failure to specifically refer to a flaw in Dr. Vest's calculations meant the Court did not find an error. *Id. at pp. A-28 to A-30, App. D.* On the other hand, the Court of Appeals affirmed the District Court's award of benefits under Plan No. 001. *Id. at p. A-28, App. D.* The Court of Appeals held that the District

Court properly applied a *de novo* standard of review to Dr. Vest's benefit determinations. *Id.* The Court of Appeals also accepted the District Court's conclusion that the corporate resolution required the Plan to guarantee a 7% annual return on Plan No. 001 account balances. *Id.*

REASONS FOR GRANTING THE WRIT

1. This Court should grant Cross-Petitioners' Writ in order to correct the Court of Appeals' error in substituting its judgement for that of the trier of fact in determining the correct benefits under Plan No. 002. In the absence of clear misapplication of the law or abuse of the District Court's discretion, factual determinations made in such a review should not be disturbed.

2. This Court should grant Cross-Petitioners' Writ in order to correct the Court of Appeals' erroneous disturbance of the District Court award of prejudgement interest and attorneys fees to Cross-Petitioners. The District Court awarded prejudgement interest as part of its total merits judgement, including other equitable relief, which should not be overturned unless the trial court abused its discretion in fashioning a remedy.

3. This Court should grant Cross-Petitioners' Writ in order to provide direction to the lower courts with regard to the specificity needed in awards of civil penalties pursuant to statutory authority such as 29 U.S.C.A. § 1132(c)(1) (West Supp. 1990). See cases cited *infra* in Section III.

4. This Court should grant Cross-Petitioners' Writ to resolve a conflict among the Courts of Appeal regard-

ing specific findings needed in connection with the application of a *de novo* standard of review.

ARGUMENT

I. **The Court of Appeals departed from the accepted and usual course of judicial proceedings by substituting its judgement of the facts for the District Court's findings and reversing the District Court's award of pension benefits under Plan No. 002.**

The District Court entered its findings of facts after viewing the documentary evidence, hearing the oral testimony and being advised of the stipulated facts. "If the District Court's findings are plausible in light of the record viewed in its entirety, the Appellate Court may not reverse, even if it is convinced that had it been sitting as a trier of fact, it would have weighed the evidence differently." *Andersen v. Bessemer City* 470 U.S. 564, 574 (1985).

Because the Court of Appeals applied an erroneous standard in reviewing the District Court's findings of fact, this Court should reinstate the judgement of the District Court concerning the correct amount of pension benefits due to Cross-Petitioners under Plan No. 002.

II. **The Court of Appeals erred in setting aside the District Court's award of attorneys fees and part of its award of prejudgement interest with respect to an amount of pension benefits which was offered to Cross-Petitioners, but only subject**

to conditions not permitted under the Plan and 29 U.S.C. § 1140.

The District Court fashioned a series of remedies to correct the wrongs done to the Cross-Petitioners. In doing so, the court relied upon the broad authority granted by Congress in ERISA cases. In actions for benefit denials under 29 U.S.C.A. § 1132, Congress provided that district courts could award several different varieties of relief, including:

(1) the recovery of benefits due under the plan [29 U.S.C.A. § 1132(a)(1)(B)];

(2) relief when plan documents are not made available to participants [29 U.S.C.A. § 1132(c)(1)];

(3) reasonable attorney's fees and costs in enforcing ERISA rights [29 U.S.C.A. § 1132(g)(1)]; and

(4) "other appropriate equitable relief" to redress ERISA violations and enforce ERISA provisions [29 U.S.C.A. § 1132(a)(5)(B)].

In the instant case, the District Court found that the Cross-Petitioners feared that acceptance of the payments offered by Dr. Vest "could prohibit them from pursuing" other claims against he and other Cross-Respondents. *See Cross-Respondents Petition p. A-6, Finding 18, App. A.* In creating the package of remedies to apply in this case, the District Court found, as a Conclusion of Law: "In ERISA cases, the Court is allowed wide discretion in determining a proper remedy." *Kaszuk v. Bakery & Confectionery Union* 791 F. 2d 548, 560 (7th Cir. 1986). *See Cross-Respondents' Petition p. A-12, App. A.* Cross-respondents "concede that prejudgement interest is appropriate in ERISA cases, see *Lorenzen v. Employees Retirement Plan of Sperry & Hutch-*

inson Co. 896 F. 2d 228, 236-37 (7th Cir. 1990)". *See Cross-Respondents' Petition p. A-30, App. D.*

This Court has ". . . repeatedly stated that prejudgement interest "is an element of [plaintiff's] complete compensation."" *Osterneck v. Ernst & Whinney* 109 S. Ct. 987, 991 (1990) citing *West Virginia v. United States* 479 U.S. 305, 310 (1987). "[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness". *Blau v. Lehman* 368 U.S. 403, 414 (1962). "[A] decision to award prejudgement interest will only be set aside if it constitutes an abuse of discretion." *General Motors Corp. v. Devex Corp.* 461 U.S. 648, 657 (1983).

Cross-Petitioners also maintain the Court of Appeals remand on the question of attorneys' fees will become superfluous when this Court reverses the Court of Appeals and reinstates the District Court's decision in its entirety. The Court of Appeals vacated that award solely on the basis of its other modifications of the District Court's decisions. In fact, that court has specifically stated in another ERISA attorneys' fee case: "If the defendant in this case is entitled to an award of attorney's fees, therefore, it is only by virtue of section 1132 (g)(1), which commits to the district judge's discretion the question of whether to award fees in a particular case." *Bittner v. Sadoff & Rudoy Industries* 728 F. 2d, 820, 828 (7th Cir. 1984). Reinstating the award of attorney's fees to Cross-Petitioners is the natural and logical consequence of this Court's reversal of the Court of Appeals.

The Court of Appeals failed to let the District Court's appropriate remedy stand despite the mandate of Con-

gress and this Court by refusing to apply the "abuse of discretion" standard. Cross-Petitioners pray that this Court reinstate the judgement of the District Court with respect to the award of attorney's fees and prejudgement interest.

III. The Court of Appeals erred in requiring the District Court to reconsider the penalty awarded for the Defendant's failure to produce plan documents as required by 29 U.S.C. § 1024.

While specificity of district court findings is a legitimate concern of the Court of Appeals, remand under these circumstances is inappropriate. The District Court, after hearing all of the evidence and evaluating the credibility of the witnesses, found as a fact that Dr. Vest was delinquent in responding to the various documents requested.

The trial judge quantified the Cross-Respondents' delinquency by defining a "document day" as "each day a document has not been produced after the expiration of 30 days from the date of demand" *See Cross-Respondents' Petition, p. A-37.* The Court of Appeals held, without citation, this was not a sufficient finding to comply with Fed. R. Civ. P. 52(a).

An analysis of the District Court decision shows that, as required by Rule 52(a), facts were specially found. *Id. p. A-37, findings 22-26.* At least one plan document had not been produced from December 17, 1985 until February 15, 1989, a period of 1126 days. Given those findings, the trial court could have assessed a penalty of $112,600 solely with respect to that document. Instead, the District

Court, using its discretion, fashioned a remedy as authorized by 29 U.S.C.A. § 1132(c)(1).

The calculation of "document days" may have been used by the District Court to illustrate to the Cross-Respondents that the court had been relatively lenient. It may have been a way to demonstrate to other Plan Administrators the possibility of very large penalties when many documents are withheld from a participant. In any event, this is only one of many different methods devised by federal District Courts to exercise their discretion in not applying the full $100 per day penalty. Similar discretionary remedies were upheld in *Daniel v. Eaton Corp.* 839 F. 2d 263 (6th Cir. 1988).

This Court should require the Court of Appeals to honor the District Court's judgement in applying appropriate relief for Cross-Petitioners' failure to produce documents and reinstate the civil penalties levied by the District Court under 29 U.S.C.A. § 1132(c).

IV. The District Court should not be required to specifically state in its findings every flaw in a Plan Administrator's interpretation of an ERISA Plan which caused it to apply a *de novo* standard of review.

In *Firestone Tire & Rubber Co. v. Bruch* 103 L. Ed. 2d 80 (1989) this Court held that the appropriate standard of review for benefit denials under 29 U.S.C.A. § 1132(a)(1) was *de novo* review, unless the plan's language gives the plan administrator discretion to construe plan terms plan and eligibility for plan benefits. The remaining question is how that *de novo* review is to be applied, which both

parties believe needs clarification. One court assumes "that *Bruch* mandates the development of a body of Federal common law applicable to *de novo* review in § 1132(a)(1)(B) actions". *Lowry v. Bankers Life and Casualty Retirement Plan* 871 F. 2d 522, 523 (5th Cir. 1989). Below, both the District Court and the Court of Appeals held that de novo review was appropriate. Then, the Court of Appeals determined the District Court had applied the *de novo* standard incorrectly by failing to identify an error made by the plan administrator. As authority for this view, the Court of Appeals cited dicta in *Petrilli v. Dreschel*, 910 F.2d 1441 (7th Cir. 1990).

Two Courts of Appeals have elaborated on the *de novo* standard without requiring identification of plan administrator error. The Sixth Circuit stated that *de novo* review is "without deference to the decision or any presumption of correctness," *Perry v. Simplicity Engineering* 12 EBC 1374, 1376 (6th Cir. 1990). A test that grants no presumption of correctness is the antithesis of the Seventh Circuit's test requiring a finding of error by the plan administrator. Like the Sixth, the Eleventh Circuit has found that "in conducting a *de novo* review, the court is bound by the provisions of the documents establishing an employee benefit plan "without deferring to either party's interpretation,"". *Brown v. Ampco-Pittsburgh Corp.* 11 EBC 1034, 1038 (11th Cir. 1989), citing *Bruch*. The Eleventh Circuit reached this conclusion again in *Moon v. American Home Assurance Co.* 12 EBC 1373 (11th Cir. 1989).

The decision of the Court of Appeals below suggests that the interpretation of a plan's words should be treated different than the calculation of the plan's benefits. *See Cross-Respondents petition, p. A-29, App. D.* While this

argument may be persuasive in theory, this case shows the danger of such a distinction. As Plan Administrator, Dr. Vest solicited Plan No. 002 benefit calculations from two disinterested actuaries. With no explanation to the Participants, he then concluded that the lower of the two amounts was the correct amount.

Calculation of benefits is dependent upon the underlying plan provisions, which need interpreting as much as the eligibility provisions at issue in *Firestone v. Bruch*. The district court is in the best position to evaluate the relative merits of different interpretation, taking into account all elements, such as the fact that the only remaining participants in the Plan (who would divide all remaining assets after Dr. Ziaee and Dr. Sherlock were paid) were Dr. Vest and his wife.

Even assuming the *de novo* review standard under *Firestone v. Bruch* requires a finding of plan administrator error, the proper disposition of this case was not reversal. Instead, the case should have been remanded to the District Court with instructions on how to conduct its *de novo* review. For example, the Eleventh Circuit, after deciding that *de novo* review was appropriate, stated that "under *Bruch* we must remand this case to the district court for its *de novo* determination" concerning eligibility under the plan. *Baker v. Big Star Division of Grand Union Co.* 893 F. 2d 288, 292 (5th Cir. 1989). The Sixth Circuit similarly held "we are constrained to remand this case to the district court with instructions to supplement the record concerning this issue, and in accordance with *Firestone*, to review defendant's denial of benefits under a *de novo* standard". *McMahan v. New England Mutual Life Insurance Co.* 888 F. 2d 426, 431 (6th Cir. 1989).

This Court should instruct the lower courts in the proper application of the *de novo* standard of review enunciated by this Court in *Firestone v. Bruch*, thereby resolving the conflict among the Courts of Appeal and allaying the confusion of plan administrators, plan participants and the lower courts.

Cross-Petitioners pray that this Court determine that where *de novo* review is proper in cases under 29 U.S.C.A. § 1132, that review be decided without deference to plan administrator's decisions. Under that standard, the judgement of the District Court should be reinstated and the judgement of the Court of Appeals reversed.

CONCLUSION

This appeal presents significant issues of ERISA law of importance to plan participants, Plan Administrators, plan sponsors and other plan fiduciaries. The case presents an opportunity for the Court to direct the lower courts in the enforcement of ERISA, particularly with respect to the discretion of trial courts to fashion appropriate remedies under the statute. Furthermore, this case gives the Court an opportunity to correct the errors of the Court of Appeals and restore to the Cross-Petitioners the benefits they have been denied. For all these reasons, the Court should issue its Writ of Certiorari.

Respectfully submitted,

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Dated this 19th day of February, 1991.